TABLE OF CONTENTS

PAGE

LIST OF AUTHORITIES

Cases

PAGE

OTHER AUTHORITIES

PAGE

STATUTES AND MUNICIPAL ORDINANCES

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-862

UNITED AIR LINES, INC.,

Appellant,

vs.

GEORGE E. MAHIN, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Illinois is reported at 49 Ill.2d 45, 273 N.E.2d 585 (1971), and is reproduced in the Appendix at page 193. The unreported opinion of the Trial Court, the Circuit Court of Cook County, is reproduced in the Appendix at page 185.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on April 1, 1971, and a timely petition for rehearing was denied by the Illinois Supreme Court on October 4, 1971. A notice of appeal was filed in that Court on December 20, 1971. A Jurisdictional Statement was filed

in this Court on January 3, 1972, asserting jurisdiction in this Court to review on appeal the judgment of the Illinois Supreme Court on the basis of Title 28, United States Code, Section 1257(2). This Court noted probable jurisdiction on March 20, 1972.

STATUTE INVOLVED

Ill. Rev. Stat., 1961 to 1971, ch. 120, § 439.3:

"A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer. Such tax is at the rate . . . of 4% of the selling price of such property . . . .

* * *

"To prevent actual or likely multistate taxation, the tax herein imposed does not apply to the use of tangible personal property in this State under the following circumstances:

* * *

"(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State . . . ."

* * *

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. I, § 8, cl. 3:

"The Congress shall have Power* * *

"[3] To regulate Commerce with foreign Nations, and among the several States. . . ."

United States Constitution, Amend. XIV, § 1:

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I. Whether the judgment of the Illinois Supreme Court applying a use tax to all fuel loaded by United aboard its interstate and foreign flights departing from Illinois violates the Commerce and Due Process Clauses.

A. Does the imposition of the Illinois Use Tax on the *act of loading* fuel aboard aircraft about to depart from Illinois on interstate and foreign flights constitute an unconstitutional burden on interstate commerce?

B. Does the Illinois use tax unconstitutionally burden interstate commerce if it is based upon the mere *intention* of United to use the fuel temporarily stored in Chicago to facilitate its interstate operations?

C. Does the application of the Illinois use tax to all of the fuel loaded aboard United's interstate flights departing Illinois result in multiple state taxation of that fuel in violation of the Commerce Clause, and bear any relationship to services provided by the State as required by the Due Process Clause?

D. Does the imposition by Illinois of a use tax on all fuel loaded aboard United's interstate and foreign flights departing from Chicago constitute a toll upon interstate commerce in contravention of the fundamental purposes of the Commerce Clause—where all of the fuel is purchased outside Illinois, rests in Illinois only for such period as is necessary for the support of United's interstate operations, and except for insignificant amounts is actually consumed outside Illinois?

II. In the alternative, whether Illinois can tax at most only that portion of the fuel loaded in Illinois that is actually consumed in Illinois?

STATEMENT OF THE CASE

This suit was initially brought by United in the Circuit Court of Cook County, Illinois to enjoin the Illinois Department of Revenue from assessing Illinois use tax, imposed by Ill. Rev. Stat., 1961 to 1971, ch. 120, §§ 439.1 *et seq.*, on all aviation fuel loaded aboard United's interstate and foreign flights departing from Chicago. All the fuel in issue is purchased by and delivered to United outside Illinois, and is temporarily stored in Illinois by United solely for the needs of its interstate and foreign operations. Nearly all of the fuel is actually consumed outside of Illinois by United's flights departing that State.* In its Amended Complaint (App. 1**) United contended, *inter alia*, that the application of the Illinois use tax to any of the fuel so loaded, would violate the Commerce Clause, Article I, § 8, cl. 3, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In the alternative, United urged that, under those constitutional prescripts, the tax could be applied to, at most, only that portion of the Illinois-laden fuel actually burned over Illinois. The Circuit Court of Cook County rejected both arguments. The Illinois Supreme Court affirmed by a 4-3 vote, holding, among other things, that the application of the use tax to all the fuel loaded in Chicago by United did not violate the Commerce Clause.

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* None of the fuel at issue in this case is used on intrastate flights.

** The "App." references are to the Appendix filed with this brief.

Statutory Background

Illinois Use Tax Act

The Illinois use tax (Ill. Rev. Stat., 1961 to 1971, ch. 120, §§ 439.1 *et seq.*) is a privilege tax* currently imposed at a rate of 4% of the selling price on the use in Illinois of tangible personal property purchased at retail. Although "use" is broadly defined (*id.*, § 439.2) to mean " . . . the exercise [in Illinois] . . . of any right or power over tangible personal property incident to the ownership of that property . . . ", the statute contains several exceptions intended "to prevent actual or likely multistate taxation" (*id.*, § 439.3 (6th unnumbered paragraph)). One of these is the "temporary storage provision" which excludes from use tax property purchased outside of Illinois, temporarily stored in the State, and used solely outside the State (*ibid.*).**

The Illinois Use Tax Act specifies that the tax is to be paid into the State's General Revenue Fund, and then expended three-fourths generally from that Fund and one-fourth transferred to the Common School Fund (*id.* § 439.9).***

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* *Id.*, at § 439.3. See *Turner* v. *Wright*, 11 Ill.2d 161, 164-165, 142 N.E.2d 84, 86-87 (1957).

** Except for rate changes the relevant provisions of the statute have remained unchanged since the original enactment of the Use Tax Act in 1955. Illinois Laws, 1955, p. 2027.

*** Ill. Rev. Stat. ch. 120, § 439.9 (20th unnumbered paragraph) provides as follows:

> "Of the moneys received by the Department under [the Use Tax] Act, after October 31, 1969, ¾ thereof shall be paid into the State Treasury, and ¼ shall be reserved in a special account and used only for the transfer from the General Revenue Fund in accordance with Section 8½ of 'An Act in relation to State finance,' approved June 10, 1919, as amended."

This ratio has varied from time to time.

Chicago Airport Ordinances

The municipal ordinances of the City of Chicago require that the fees charged to the commercial airlines, such as United, and other users of O'Hare and Midway Airports, constitute full compensation for the use of the hangars, cargo buildings, terminal fuel system facilities, in addition to the runways, ramp and landing rights.* Moreover, the bond issues which financed O'Hare, the principal Chicago airport, require such fees to cover not only operating and maintenance expenses, but to be sufficient to amortize the bond indebtedness which financed that airport.**

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* "No person shall use the airport facilities at Chicago Midway Airport or Chicago-O'Hare International Airport for operation of aircraft, including non-commercial private aircraft, without paying compensation for the use of such facilities in accordance with the following schedule of rates, except to the extent that a contract with the City covering part or all of the operation is in effect specifying a different rate." Municipal Code of Chicago, § 37-11, as amended, January 1, 1971.

** The 1959 Bond Ordinance provides in pertinent part as follows:

> "The City covenants that prior to the issuance of the Chicago-O'Hare International Airport Revenue Bonds authorized by this Ordinance, it will fix and place in effect rents, fees, rates and other charges for the use of the Airport including any services rendered by the City in the operation thereof, and an initial schedule of fees, rates and other charges that from time to time will be adjusted, in order that the Revenues of the Airport will be sufficient at all times to meet the following under the provisions of this Article: (a) to provide funds for the payment of the cost of operation and maintenance; (b) to provide for making required deposits to the credit of the Interest Account; (c) to provide for making required deposits to the credit of the Debt Service Reserve Account; (d) to provide for making required deposits to the credit of the Sinking Fund Account; (e) to provide for making required deposits to the credit of the Reserve Maintenance Account; and (f) to provide for making required de-

Burn-Off Rule

From 1955, when the Illinois use tax was enacted, until 1963, the temporary storage exception was consistently construed by the Illinois Department of Revenue to apply to fuel purchased outside Illinois by common carriers and temporarily stored by them in the State, so that only that portion of the fuel loaded aboard departing flights (or surface vehicles) that was actually burned in Illinois was subject to the use tax. This interpretation was known as the "burn-off" rule. In 1963, without any change of statute or intervening court decision, the Department repudiated the burn-off rule by a Bulletin that provided in part (App. 23):

> ". . . temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is *placed into the tank of the airplane,* railroad engine or truck. *At this point, the fuel is converted into its ultimate use,* and, therefore, a taxable use occurs in Illinois.
>
> "If a common carrier does not have separate facilities for transferring the fuel out of the State of Illinois but always puts it into the tank of the airplane, railroad engine or truck for final consumption, . . . they no longer will be able to give a certificate . . . stating that the fuel is purchased within the temporary storage provisions of the Use Tax Act, but must pay the use tax. . . ." (Emphasis added.)

United contended in the lower courts, *inter alia,* that the imposition of the tax on the placing or loading of the fuel

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posits to the credit of the Emergency Reserve Account. . . ." Ordinance Authorizing Chicago-O'Hare International Airport Revenue Bonds Series of 1959, Article V, Section 5.01 (adopted December 29, 1958).

Under the 1959 Bond Ordinance, $120,000,000 in airport revenue bonds were issued on January 1, 1959. Subsequent bonds were issued under supplementary ordinances in 1961, 1962, 1967, 1968, and 1970, all of which incorporated by reference the basic 1959 Ordinance.

into the tanks of aircraft departing on interstate and foreign journeys would create a direct burden on interstate commerce in violation of the Commerce Clause, and that such tax would also violate the Due Process Clause of the Fourteenth Amendment. In the alternative, United took the position that only the portion of the Illinois-laden fuel actually consumed within the State by the departing aircraft constitutionally could be subjected to Illinois use tax.

Decision Below

By a 4 to 3 vote, the Illinois Supreme Court upheld the position of the Department of Revenue's Bulletin that the fuel was "converted into its ultimate use" when it was placed into the tanks of the aircraft, and held that a tax was due on all the fuel so loaded aboard United's interstate and foreign flights about to depart from Chicago.

The principal (*per curiam*) opinion, in which two justices fully joined, states explicitly that if the fuel were taken from the State "by some means other than placing it in equipment which would consume it" (App. 195), the temporary storage exemption would extend not merely to stationary storage on the ground, but also to its loading aboard transportation vehicles such as tank trucks or railroad tank cars, and to its transportation from the State. (App. 202.) The rationale for this conclusion is that unless the means of removing the property from the State is included within the scope of the temporary storage provision, it would be a nullity. Since there is no tax if the fuel is withdrawn from storage and taken from the State by other means, it is clear that neither the storage nor the removal from storage is what makes the fuel taxable. This leaves the act of loading the fuel into the fuel tanks of the aircraft as the taxable event—that is, the tax is imposed on the actual loading of the aircraft which commits the fuel to interstate commerce.

The *per curiam* opinion supplements this analysis by the statement that United was not entitled to the temporary exemption because (App. 202):

> ". . . United does not store in Illinois with any intention that the fuel will be used solely outside this State.[*] Rather, the fuel is *stored here only to facilitate United's* [*interstate*] *operations from the O'Hare and Midway airports within the State.* Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois." (Emphasis added.)

The opinion concludes that application of the tax to all the fuel loaded aboard interstate and foreign flights does not violate the Commerce Clause.

The *per curiam* opinion reached the result it did on the basis of two preliminary conclusions: (i) that the imposition of the tax according to the "burn-off" rule, by which only Illinois-laden fuel actually burned in Illinois is subject to use tax, was prohibited as a burden on interstate commerce by this Court's decision in *Helson and Randolph* v. *Kentucky*, 279 U.S. 245 (1929), and (ii) that *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933), permits the taxation of all fuel stored and loaded in Illinois even though it is consumed by interstate flights. This pair of conclusions produces the anomalous result that a tax on *all* the fuel loaded is deemed less of a burden on interstate commerce than a tax on only the *portion* of such Illinois-laden fuel actually consumed in Illinois.

Although United strenuously asserted that the fuel purchased by United in Indiana and loaded in Illinois was being subjected both to Indiana gross income tax and Illinois

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[*] What the reference to United's intention means is not clear, since United knew, and therefore intended, that almost all of the fuel would be consumed outside of Illinois.

use tax, the *per curiam* opinion does not allude to the question of multiple state taxation in its constitutional analysis.

In a short separate opinion, the two concurring justices expressed uncertainty as to whether the burn-off rule was "constitutionally impermissible," but found it unnecessary to answer that question. They affirmed on the basis of "the plain meaning of the statutory language," and agreed (App. 203) with the *per curiam* opinion that:

> "Illinois may constitutionally collect the tax imposed in this case on all of the fuel loaded on United's planes at the airports."

They, too, ignored the issue of multiple State taxation.

Justices Kluczynski, Schaefer and Davis, dissenting (App. 203), disagreed with the conclusion that the burn-off rules was barred by the *Helson* case; they went on to conclude that the burn-off rule was the correct construction of the Illinois statute (an issue not before this Court). (App. 204-205.)

Summary of Facts

Purchase, Delivery and Handling of the Fuel

All the aviation fuel involved in this case is purchased from the Shell Oil Company by United in Indiana, and is delivered to United at Shell's depots in Hammond and East Chicago, Indiana. (Stipulation, ¶ 6, App. 38; Illinois Supreme Court Opinion, App. 194; Trial Court Opinion, App. 185-186). All purchases are subject to the Indiana gross income tax, currently at a rate of ½% of the purchase price,* which, pursuant to contract with Shell, United

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* Burns Ind. Stat. Ann. tit. 64, ch. 26, §§ 64-2601 to 64-2603. The rate of this tax has varied since the outset of this case, June 1963, from ⅜% to ½%.

is obligated to pay.* The fuel is then transported by common carriers to O'Hare and Midway airports in Chicago where it is stored only for such time as is necessary for certain purification processes and United's operating needs. (Stipulation, ¶¶ 7-8, App. 38; Tr.** 335-336, App. 169-170.) All of the fuel is pumped into United's aircraft fuel tanks, almost always immediately prior to the aircraft's departure on interstate or foreign flights. (Stipulation, ¶¶ 7, 8, App. 38; Tr. 42-45, 70-71, App. 61-64, 73-74.) United has handled its fuel purchasing and loading arrangements in essentially the same manner since May, 1953 (Illinois Supreme Court Opinion, App. 194), *two years prior* to the enactment of the Illinois Use Tax Act. (Tr. 309, 350-351, App. 161, 174-175.)

Consumption of the Fuel

At trial United introduced detailed and uncontroverted evidence that very little of the fuel loaded aboard its aircraft at O'Hare and Midway airports are burned in or over Illinois, and such as is burned, is consumed on only about 3.7% of United's departing flights. These conclusions derive from a combination of facts.

1. United is able to determine with precision the amount of fuel, including ground taxi fuel, each of its aircraft

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* From July 1, 1963, through December 31, 1967, the amount of Indiana tax paid by United amounted to approximately $403,000, and approximately $150,000 for 1968. (Tr. 154-155, App. 102.) The Indiana gross income tax remains in effect, and the fuel purchased in Indiana by United continues to be subject to it.

While the legal incidence of the Indiana tax is, in the first instance, upon the seller, Indiana law permits parties by contract to shift the burden of the tax to the purchaser. *Herlihy Mid-Continent Co.* v. *Northern Indiana Pub. Service Co.*, 245 F.2d 440, 443 (7 Cir. 1957).

** The "Tr." references are to the Report of Proceedings before the trial court which are contained in the official record.

burns from the moment its engines are started until it crosses the Illinois border departing from the State.* (Tr. 106-107, App. 86-87; UA Ex. 24, App. 236, Tr. 107.)

2. Under FAA Regulations, all of United's flights must be planned so as to arrive at their destination with large amounts of reserve fuel on board. United uniformly requires that all its aircraft carry supplementary reserves approximately 50% in excess of those specified by the FAA; these supplementary reserves are in turn approved by the FAA. To illustrate, the FAA and combined reserves

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* United's flight patterns and use of fuel are rigidly controlled by the Federal Aviation Agency, pursuant to the authority granted in the Federal Aviation Act, 49 U.S.C. §§ 1301 *et seq.*

The FAA requires commercial aircraft to operate over specifically defined departure routes leading them out of the State and to their destination. (Stipulation, ¶ 3, App. 35-37; Tr. 79-81, 87, App. 76-77, 80; UA Ex. 20, App. 233, Tr. 104.) These departure routes, from which, for safety and operational reasons, only immaterial deviation is permitted, can be thought of as "aerial highways." They perform the same function as surface highways, and almost all of United's flights follow the same departure routes day after day. (Tr. 80-84, App. 76-78.)

United's aircraft are flown in accordance with standard procedures promulgated by United and approved by the FAA. (Stipulation, ¶ 3, App. 35-37; Tr. 101-03, App. 83-84; UA Ex. 23, App. 235, Tr. 122.) These procedures specify the engine power settings to be used in all phases of flight, including takeoff, climb and cruise, for each type of aircraft. (Tr. 88-90, App. 81-82). United maintains current data for each of its aircraft types showing fuel consumption at each power setting. (Stipulation, ¶ 3, App. 35-37; Tr. 105-106, App. 86-87.) It also maintains current records of fuel consumed during ground taxi time at the Chicago airports for each type of aircraft. (Tr. 106-107, App. 86-87.) Either by calculation of fuel consumption or by fuel gauge readings, United can determine the exact fuel consumption over Illinois of all its flights departing Illinois.

for a 3-engine Boeing 727 are 5,400 and 8,100 pounds, and for a 4-engine Douglas DC-8 are 8,000 and 12,000 pounds (UA Ex. 25, App. 237, Tr. 115). In addition, when there is a threat of bad weather at the scheduled destination, FAA Regulations require aircraft to carry fuel sufficient to arrive at the intended destination, plus additional fuel sufficient to fly to a specified alternate airport and land there with reserves on board equal to those normally required for the original destination. The most commonly used alternate airports for Chicago are Milwaukee, Detroit, Minneapolis-St. Paul, Cleveland and Omaha, which require additional reserves ranging from 6,000 to 18,000 pounds for a DC-8. (Stipulation, ¶ 10, App. 39-40.) Many of these flights do not go to the alternate airport, but land at their scheduled destination with this extra fuel on board.

As a result of these safety requirements, all of United's aircraft arriving at Chicago land with very substantial amounts of unused fuel in their fuel storage tanks.* Two surveys, utilizing actual fuel gauge readings for more than 18,000 flights during 1963 and 1967, show that (UA Exs. 20, 21, 27, App. 233, 234, 240, Tr. 104, 100, 120):

(a) every flight lands in Chicago with sufficient fuel on board to take it beyond the borders of Illinois on the FAA route *actually assigned* to that aircraft on its departure from Illinois (Stipulation, ¶ 11, App. 40); and

(b) 99.97% of the flights land in Chicago with, on the average, from 1.9 to 7 times as much fuel as would be required to depart from Illinois over any routes

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* A survey of over 13,500 United flights landing in Chicago in 1967 disclosed that 100% of them landed with the FAA-required fuel reserves, and 99.6% landed with the higher (FAA-approved) United fuel reserves. (UA Ex. 26, App. 238-239, Tr. 118.)

regularly assigned to United by the FAA, as follows:

Routes*	Miles in Illinois	Percentage of United Flights Using	Ratio of Landed Fuel to Fuel Needed in Illinois for Departure Route: All Aircraft	Ratio of Landed Fuel to Fuel Needed in Illinois for Departure Route: 727's**
6 East 1 North 1 Northwest	63 or less	64.30%	From 3.4 to 7.0 times	From 4.2 to 5.4 times
3 West	116 to 131	32.00%	2.4–3.5	3.0–3.1
2 West	176 and 207	3.67%	1.9–2.8	2.4–2.6
1 West***	265	0.03%	1.7–2.2	2.2
		100.00%		

3. The fuel on board United flights landing in Chicago is extremely chilled because of the low temperatures encountered during high altitude flight. (Tr. 173, App. 110-111.) In contrast, the temperature of the fuel loaded in Chicago is at approximately the local surface air temperature. The year-round temperature differential between the landed fuel and the fuel loaded in Chicago ranges between 45° to 50° F. This results in a significant difference in the specific gravity of the two quantities, and thereby causes stratification of the colder from the warmer fuel, with the cold landed fuel forming a distinct layer at the bottom of the aircraft storage tanks. (Tr. 173-177, App. 110-114.) Since all fuel consumed during flight is pumped to the engines from the bottom of these tanks, the cold bottom layer of landed fuel is burned first. (Tr. 179-182, App. 114-117.) (Trial Court opinion, App. 187.)

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* The departure routes can be identified on the map of Illinois (UA Ex. 20, App. 233, Tr. 104) and on the related table (UA Ex. 21, App. 234, Tr. 100).

** The Boeing 727 performed slightly more than 50% of the 18,000 flights surveyed.

*** This route is used as a "safety valve" during extreme weather conditions. (Tr. 86-87, App. 79-80.)

There is some intermixing of the newly-loaded fuel with the cold landed fuel at the time of fueling. This mixing is not uniform through the tank, but is primarily confined to the upper portion of the cold fuel and the lower portion of the warmer fuel. The lower portion of the cold fuel remains basically unmixed at the bottom of the aircraft tanks. (Tr. 176, 181-182, App. 112-113, 115-117.)

The fact that the intermixing does not appreciably affect the cold fuel at the bottom of the tank is particularly significant in light of the fact that the cold landed fuel, as a weighted average, equals the amount of fuel loaded in Chicago—i.e., it averages about 50% of the total fuel on board at takeoff. (Stipulation, Appendix 2, App. 43).

If it is assumed that only half (1/4 of the takeoff fuel) of the cold landed fuel remains unmixed at the bottom of the tanks, reference to the chart on page 14 above discloses that no departing flights (except the .03% using the safety-valve west route) consume in Illinois more than *de minimis* amounts of Illinois-laden fuel. If a more conservative estimate is made that only 40% (1/5 of the takeoff fuel) of the landed fuel remains unmixed, only 3.7% of the departures consume more than *de minimis* amounts of Illinois-laden fuel while in the State. For this conclusion to apply to only the 64.30% of the flights that depart to the East and North, only 1/3 to 1/7 of cold fuel need be unmixed.

4. Because of the reserve fuel safety requirements, previously mentioned, each United flight departing from Chicago loads substantial amounts of excess fuel which is intended to and does remain in storage throughout the flight and is on board when the flight lands at its destination. This fuel will not be used until later flights beyond that destination. This can be typically illustrated by reference to over 9,000 departures from Chicago by Boeing 727's during the 1963 and 1967 surveys (which comprise over half

of the departures of those surveys). The combined FAA and United fuel reserve for this aircraft is 8,100 pounds.* On the average, these flights loaded 15,300 pounds in Chicago, so that more than half of the fuel loaded was for reserve purposes, and would be on board the departing flight when it landed in another State.**

Interstate Operations

The evidence shows that United is an instrumentality of interstate commerce, fully regulated by several agencies of the Federal Government. United operates its flights pursuant to Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board ("CAB"), its schedules must be filed with the CAB and the United States Postal Service, its aircraft must be flown according to comprehensive procedures established by the FAA, and it is obligated, weather and equipment permitting, to perform all flights as scheduled. To meet its schedules, and perform its contracts with passengers and shippers, United must load large quantities of fuel in Illinois and transport that fuel outside the State on interstate and foreign flights. As already mentioned, a significant portion of such fuel is burned after the departing planes have landed in another State and are proceeding on the next and subsequent legs of their journey. (Stipulation, ¶¶ 1-3, 5, 9-12, App. 33-37, 39-41.)

These facts, however, give only a superficial indication of the non-local nature of United's operations at and through O'Hare and Midway Airports. While only 5.4% of

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* As indicated by the footnote on page 13, these reserves will be on board at landing in virtually all instances.

** Actually, 8,100 pounds is an understatement as an average reserve figure because it excludes the additional bad weather reserves previously explained.

United's system's passengers are enplaned in Chicago, 28.5% are part of its Chicago traffic, of which 62%* are carried through Chicago by through or connecting flights. (Tr. 41, App. 61; UA Ex. 8, App. 231, Tr. 39.)

Of its 234 departures per day from Chicago (Tr. 42, App. 61), 73% are through flights averaging only 45 minutes on the ground, and 19% are "short turn-arounds" averaging one hour and 52 minutes in Chicago.** (Tr. 42, 44-45, App. 61-63; UA Ex. 9, App. 232, Tr. 47.) Of United's CAB authorized route system of 17,420 unduplicated miles, only 256 route miles (1.5%) are within Illinois. (Stipulation, ¶2, App. 34.) By contrast, more than 13% of its daily flights take off from Chicago (Tr. 42, App. 61), and 16.5% of all of the fuel used by United is loaded in Chicago. (See Tr. 358-360, App. 176-177.)

Because of its geographical location, Chicago receives a substantial volume of air service, from United and from other carriers, that it would not otherwise receive. (Tr. 33-35, App. 56-58.) Most of this "excess" service is through traffic with no local aspect. For it, Chicago is a connecting link in a continuous interstate movement that both begins and ends outside Illinois. The Chicago airports' role for this traffic is merely to enable passengers to transfer from one flight to another, on or between lines, and to load fuel and supplies aboard the aircraft while it is on the ground no longer than is necessary to have these functions performed. (Tr. 45-47, App. 63-64.)

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* This figure is understated because it misses passengers transferring flights in Chicago who do not hold continuation tickets. (Cf. Tr. 37-38, App. 59.)

** A "short turn-around" occurs when an aircraft terminates one flight in Chicago and promptly takes off as another flight. (Tr. 43, App. 62.) The remaining 8% stay overnight in Chicago for scheduling purposes. (See Tr. 42, App. 61; UA Ex. 9, App. 232, Tr. 47.)

SUMMARY OF THE ARGUMENT

I.A. The Illinois use tax, as applied to the act of loading fuel aboard United's aircraft in Chicago, constitutes a direct unconstitutional burden upon interstate commerce, in violation of the controlling decisions of this Court, because the State of Illinois is seeking to exact a privilege tax for engaging in an activity that is an integral part of interstate commerce which cannot be the subject of a state privilege tax.

I.B. Moreover, if the principal (*per curiam*) opinion of the Illinois Supreme Court is read literally to mean that United is to be denied the usual benefits of the temporary storage provision *solely because* the fuel in question is stored in Illinois to facilitate United's interstate operations, then the lower court has overtly discriminated against interstate commerce. In effect, it is conditioning United's entitlement to a state statutory exemption upon the requirement that it refrain from storing fuel in Illinois to support its interstate operations from that State.

I.C. The Illinois Use Tax Act, as applied to all the fuel loaded aboard United's aircraft in Chicago, also contravenes the Commerce Clause because it results in multiple state taxation of the fuel, the purchase of which by United is subject to the Indiana gross income tax. Moreover, the taxation of all of the fuel loaded in Chicago by United bears no reasonable relationship to—and does not purport to have any relationship to—the services or protection that United and other carriers may receive from the State of Illinois, as required by the Due Process Clause.

D. Taxation of the entire amount of the fuel loaded in Chicago not only is an unconstitutional burden upon interstate commerce for the specific reasons outlined under A, B and C above, but it also constitutes a toll upon interstate

commerce in derogation of the very purpose of the Commerce Clause. By applying its use tax to all fuel loaded by interstate flights departing Chicago, even though none is purchased in Illinois, and very little of such fuel is used or consumed in the State, Illinois is attempting to exploit its location as the hub of the nation's air (and surface) transportation system to impose a toll on the passage of commerce through it. The amount of the tax sought bears no reasonable relationship to the protection and services rendered to that commerce by that State.

II. As an alternative to the contention that Illinois cannot impose use tax on any fuel loaded aboard interstate and foreign flights, United suggests that, at most, Illinois may be constitutionally entitled to tax that portion of the fuel *stored and actually burned* in the State. By misconstruing prior decisions of this Court, the Illinois Supreme Court concluded that taxing only the fuel burned in Illinois offends the Commerce Clause. This created the incongruous result that taxing *all* of the fuel loaded in Illinois is deemed less of a burden on interstate commerce than taxing, under the burn-off rule, only that portion of the fuel which is actually burned in Illinois.

ARGUMENT

I. The Judgment of the Illinois Supreme Court Applying a Use Tax to All Fuel Loaded by United Aboard Its Interstate and Foreign Flights Departing from Illinois Violates the Commerce and Due Process Clauses.

A. The Imposition of the Illinois Use Tax on the Act of Loading Fuel Aboard Aircraft About to Depart from Illinois on Interstate and Foreign Flights Constitutes an Unconstitutional Burden on Interstate Commerce.

The Illinois use tax, as authoritatively construed by the Illinois Supreme Court, is imposed upon the act of loading fuel into United's planes immediately prior to the commencement of their interstate and foreign journeys from Illinois.* That this is the taxable event is evident both from the scope of the Illinois temporary storage exemption and from the reasoning of the Illinois Court.**

Inasmuch as Illinois seeks to tax all the fuel stored and loaded in Chicago, there are only three events that occur in the State applicable to *all* the fuel which could be the basis of such taxation: storage, withdrawal from storage, or

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* See generally pages 8-10, *supra*.

** It is a fundamental principle of constitutional law that the validity of a state exaction depends on "the practical operation of the tax, that is, substance rather than form." *American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965). This approach requires the court to look behind the State's own characterization or justification of the charge and ascertain its actual "operating incidence." *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940). The court must determine the "ultimate effect of the law as applied and enforced." *American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965); see *Connecticut Gen. Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 80 (1938). As this Court stated in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 608 (1951), "[i]t is not a matter of labels. The incidence of the tax provides the answer."

loading aboard the aircraft.* It is neither the temporary ground storage of the fuel nor its withdrawal from such storage because, according to the Illinois Court's reasoning, what occurs after such withdrawal is decisive as to whether the tax is imposed. The *per curiam* opinion is explicit in stating that, if after withdrawal the fuel were transported from Chicago to Milwaukee in a tank truck for use at the Milwaukee airport, no tax would be due. (App. 202.) It follows that, under the Illinois Court's decision, the taxable event is, and can only be, the act of loading it aboard United's aircraft in Illinois preparatory to their interstate journeys. As thus interpreted, the Illinois use tax is imposed on an integral and inseparable component of the interstate transportation process.

Numerous cases decided by this Court support the principle that an integral aspect of interstate commerce may not be subjected to state taxation. A leading case, similar to the instant one, which the Illinois Supreme Court failed to follow, is *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954). There Texas claimed that the transfer of gas from a refinery pipeline to an interstate line was sufficient to trigger a severance tax at the moment the fuel passed from one line to the other. As described in Mr. Justice Clark's unanimous opinion for the Court, "the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission." 347 U.S. at 161. In holding that the tax, as applied by the State to the transmission of the gas in interstate commerce, would result in an

* The tax is not on the burning of the fuel because the Illinois Court concluded that *Helson and Randolph* v. *Kentucky*, *supra*, prohibits taxation of consumption of the fuel on interstate flights. (App. 196-197.) Moreover, only a fraction of the fuel is consumed in Illinois.

unconstitutional direct burden on interstate commerce, this Court stated (347 U.S. at 166):

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. *Memphis Natural Gas Co.* v. *Stone,* 335 U.S. 80, 87 (1948); *Western Live Stock* v. *Bureau of Revenue,* [303 U.S. 250] at 258."

The Court then described in detail the intimate relationship between the activity sought to be taxed and interstate commerce, and it did so in language equally applicable to the instant case (347 U.S. at 167-168):

> "[R]eceipt of the gas in the pipeline is more than its 'taking'; *from a practical standpoint it is its 'taking off' in appellants' carrier into commerce; in reality the tax is, therefore, on the exit of the gas from the State.* This economic process is inherently unsusceptible of division into a distant local activity capable of forming the basis for the tax imposed, on the one hand, and a separate movement in commerce, on the other. It is difficult to conceive of a factual situation where the incidence of taking or loading for transmission is more closely related to the transmission itself. This Court has held that much less integrated activity is 'so closely related to interstate transportation as to be practically a part of it' [quoting, *Baltimore & Ohio S. W. R. Co.* v. *Burtch,* 263 U.S. 540, 544 (1924) (loading or unloading of a shipment)]." (Emphasis added.)

Concluding that all taxable local activities had been completed prior to the occurrence of the alleged taxable event, this Court held that (*id.*, at 169):

> ". . . as a basis for finding a separate local activity, the incidence [of the tax] must be a more substantial economic factor than the movement of the gas from a

local outlet of one owner into the connecting interstate pipeline of another."

During the same Term, this Court was confronted in *Railway Express Agency* v. *Virginia*, 347 U.S. 359 (1954), with an attempt by the State to impose a privilege tax measured by gross receipts, as is the Illinois use tax, upon the interstate activities of the Railway Express Agency. The State contended that three incidents of the Agency's activities were sufficiently localized to sustain the imposition of the tax, namely, the local pickup of parcels, the delivery of parcels within the State, and the movement of parcels through the State. This Court rejected the contention that the State had the power to tax such so-called "local incidents," holding specifically that "local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax." 347 U.S. at 368 (citations omitted).

So, also, in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U.S. 90, 92-94 (1937)* and *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U.S. 422, 427, 433-434 (1947), this Court held that a State could not impose a gross receipts tax upon the loading or unloading of interstate vessels because those activities were so integrally related to interstate commerce that no separate local taxable event could be identified to sustain the imposition of the tax.

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* In the *Puget Sound* case, this Court held that "[t]he business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling" 302 U.S. 90, 94 (1937) (citations omitted). The decision in *Puget Sound* was expressly followed in *Joseph* v. *Carter & Weeks Stevedoring Co.*, 330 U.S. 422, 433 (1947).

In *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946), which raised essentially the same issue in the context of the Import-Export Clause (Article I, § 10, cl. 2), this Court held that an attempt by the State of California to impose a sales tax at the moment title to fuel oil passed as it was delivered into a ship for carriage to a foreign destination was invalid because "[t]he incident which gave rise to the accrual of the tax was a step in the export process." 329 U.S. at 84.*

Mr. Justice Rutledge in *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), which invalidated a municipal ordinance that imposed a license fee upon the business of soliciting orders for the purchase of goods to be shipped interstate, dealt at some length with the concept of a "local incident" which is constitutionally necessary to support the imposition of a tax upon a component of interstate commerce. In *Nippert*, the Court stated (327 U.S. at 423-424):

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines

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* See, in addition, *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95, 101 (1929); *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 275-278 (1872); *Norris* v. *City of Boston*, 48 U.S. (7 How.) 283, 464 (1849). See also *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389 (1952); *Ozark Pipe Line Co.* v. *Monier*, 266 U.S. 555 (1925); *United Fuel Gas Co.* v. *Hallanan*, 257 U.S. 277 (1921); *Texas Gas Transmission Corp.* v. *Benson*, 444 S.W.2d 137 (Tenn. 1969).

of the States and necessarily involves 'incidents' occuring within each State through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result.

"It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and *even substantial connections, in an economic sense, have been held inadequate to support the local tax.* But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, *whether or not a 'local incident' related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce.*" (Emphasis added.)

Just as in *Michigan-Wisconsin Pipe Line* and in the other cases cited above, Illinois has attempted to segregate a "local incident"—namely, the loading of fuel into aircraft tanks for use in interstate flights—and to subject that "local incident" to a privilege tax even though it is an integral part of interstate commerce and does not, under any persuasive theory, represent an independent and separable local activity upon which the State may legitimately exercise its powers of taxation to impose a privilege tax. As this Court stated in *Joseph* v. *Carter & Weeks, Co.*:

"The transportation in commerce, *at the least, begins with loading* and ends with unloading. Loading and

unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself." 330 U.S. at 427-428. (Emphasis added.)

So, also, in *Baltimore & Ohio Southwestern R.R. Co.*, v. *Burtch*, 263 U.S. 540, 544 (1924), this Court stated unequivocally that "[i]t is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it. . . ." And, in *Railway Express Agency* v. *Virginia*, 347 U.S. 359 (1954), discussed *supra* at page 23, this Court held that the local pickup and delivery of parcels which travelled in interstate commerce were insufficient "local incidents" to sustain the imposition of a state tax thereon.

This unbroken line of decisions of this Court makes it manifest that the act of loading an interstate shipment is not a sufficient "local incident" which will support the imposition of a state privilege tax. It follows that the attempt by Illinois to impose its privilege-use tax upon the act of loading all the fuel aboard United's aircraft in Chicago for immediate utilization by interstate and foreign flights is a direct burden on interstate commerce prohibited by the Commerce Clause.

Taxing the loading of the fuel is as direct a tax on interstate commerce as taxing its consumption during such commerce, condemned by *Helson and Randolph* v. *Kentucky*, 279 U.S. 245 (1929).* See also *Bingaman* v. *Golden Eagle*

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* As discussed in Part II, *infra* at pages 44-50, the Illinois Supreme Court inexplicably concluded that *Helson* forbade taxing that portion of the Illinois-laden fuel burned in the State but did not prohibit taxing all of the fuel loaded in Illinois regardless where it is consumed.

Western Lines, 297 U.S. 626, 629 (1935); *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 180 (1939); *Mid-Continent Air Express Corp.* v. *Lujan*, 47 F.2d 266, 267-268 (D. N.M. 1931).

The Illinois Supreme Court relied upon *Edelman* v. *Boeing Air Transport*, 289 U.S. 249 (1933), and *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933), for the proposition that Illinois could constitutionally tax *all* of the fuel loaded in Chicago. The lower court misapplied these decisions, which predate the authorities outlined above. Indeed, far from sustaining the lower court's position, these cases add considerable support to United's argument.

Edelman and *Nashville* both involved state taxes the legal incidence of which was explicitly upon the storage of fuel, upon its withdrawal from storage, or upon both of these events. In each instance the tax was imposed on or before withdrawal of the fuel without regard to what was done with the fuel thereafter. The tax consequence was the same whether the fuel was loaded into an airplane, a railroad engine, a tank truck or a pipeline. These cases, therefore, are distinguishable from the instant case, where the incidence of the use tax is determined according to the receptacle into which the fuel is loaded—i.e., taxable if loaded into the tanks of an airplane or of a railroad locomotive, but not if placed in a tank truck or tank car, thus making the loading the taxable event. The difference between taxing withdrawal and taxing loading was recognized in *Nashville C. & St. L. Ry.* v. *Wallace*, where this Court stated (288 U.S. at 268):

> "[T]here can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky, supra*.

> Here the *tax is imposed on* the successive exercise of two of those powers, *the storage and withdrawal from storage* of the gasoline. *Both powers are completely exercised before use of the gasoline in interstate commerce begins.* The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations." (Emphasis added.)

The foregoing passage was quoted with approval in *Edelman* v. *Boeing Air Transport*, 289 U.S. at 252, with the conclusion ". . . that the statute as applied [in *Edelman*] is identical in operation with that sustained in *Nashville*. . . ."

The constitutional difference between the instant case and *Edelman* and *Nashville* has numerous parallels. In *American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965), and *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 608 (1951) (see footnote at page 20, *supra*), this Court emphasized that it is the "operating incidence" of the state tax which is the critical factor in determining its constitutionality under the Commerce Clause, and that if that incidence takes the form of a privilege tax upon engaging in interstate commerce—such as Illinois' privilege-use tax upon the loading of fuel in the instant case—the tax must fall under the Commerce Clause. If the tax is levied on that which is constitutionally protected from state interference, it will not be saved by the contention that the same amount of tax might validly have been collected under some other form. Compare *Railway Express Agency* v. *Virginia*, 347 U.S. 359 (1954) (privilege tax for doing interstate business in State unconstitutional) with *Railway Express Agency* v. *Virginia*, 358 U.S. 434 (1954) (franchise tax, in lieu of intangible property tax, measured by gross receipts derived within State constitutional). See also *McLeod* v. *J. E. Dil-*

worth Co., 322 U.S. 327, 330 (1944). When the State attempts to impose a privilege tax upon an integral aspect of interstate commerce, it has surpassed the bounds of its constitutional powers.

The distinction between a privilege tax imposed upon an integral part of interstate commerce and other forms of taxation, such as a user charge or fee for services rendered by the State, was recently reiterated by this Court in *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines*, 92 S.Ct. 1349 (1972), which held that the States may properly impose a reasonable user charge upon interstate carriers or travelers in order to compensate the States for the services they provide for them. This Court distinguished such user fees from taxes imposed upon the privilege of engaging in interstate commerce, 92 S.Ct. at 1353-1354, by comparing *Hendrick* v. *Maryland*, 235 U.S. 610 (1915), which sustained a fee upon drivers to defray road construction and repair costs, with *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 605 (1951). Mr. Justice Brennan, speaking for the Court, stated, 92 S.Ct. at 1354, n. 6, that

> ". . . in striking down a state tax construed as falling 'upon the privilege of carrying on a business that was *exclusively* interstate in character,' *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 605 (1951) (emphasis in original), the Court expressly distinguished it from a tax 'levied as compensation for the use of highways.' *Id.*, at 607."

In the instant case, Illinois has attempted to accomplish the equivalent to what Connecticut had sought in *Spector*, namely, to impose a privilege tax directly upon an integral aspect of interstate commerce. The tax itself is denominated a "privilege" tax, Ill. Rev. Stat. 1961-1971, ch. 120, § 439.3, and has been characterized as such by the Illinois

Supreme Court. *Turner* v. *Wright*, 11 Ill.2d 161, 164-165, 142 N.E.2d 84, 86-87 (1957). As previously noted (page 6, *supra*), under the Municipal Ordinances of the City of Chicago, United and other carriers are obligated to pay fees for the use of the Chicago airports to compensate the City fully for the operation, maintenance and financing of the airport facilities. In contrast (see page 5, *supra*), the funds derived from the Illinois use tax are placed in the State's General Revenue Fund and are used for general revenue purposes (with the exception of that portion which is used for support of the public schools).* Therefore, no persuasive argument can be advanced that the use tax may be viewed as compensation for any specific services provided by the State.

To summarize, Illinois seeks to lay a privilege tax upon an integral aspect of interstate commerce, namely, the loading of fuel aboard aircraft about to depart in interstate and foreign operations. Under the consistent rulings of this Court, including the most recent pronouncement in the *Evansville-Vanderburgh* case, the Illinois use tax cannot be so imposed without violating the Commerce clause.

B. The Illinois Use Tax Unconstitutionally Burdens Interstate Commerce If It Is Based Upon the Mere Intention of United to Use the Fuel Temporarily Stored in Chicago to Facilitate Its Interstate Operations.

The *per curiam* opinion of the Illinois Supreme Court declares that the interstate commerce cases discussed above in support of United's position are inapplicable because,

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* In addition, United, with other carriers, is subject to Illinois real and personal property taxes on property in Illinois, income tax on income derived from that State, and sales and use taxes on the purchase or use of property in Illinois. See respectively Ill. Rev. Stat., 1971, ch. 120, §§ 482-811; 1-101 to 17-1701; 440-453; 439.1-439.23.

under the plain language of the Illinois statute, the temporary storage exception can only apply to fuel to be used (burned) "solely outside this State." (App. 202.) The opinion follows this with a *non sequitur:*

> "... United does not store in Illinois with any intention that the fuel will be used solely outside this State. Rather, the fuel is *stored here only to facilitate United's [interstate] operations from the O'Hare and Midway airports within the State.* Under the circumstances, the 'storage' becomes something more than a 'temporary storage' for safekeeping prior to its use solely outside of Illinois." (App. 202.) (Emphasis added.)

If this passage is to be taken literally, the Illinois Court has concluded that United's storage of the fuel in Chicago for the purpose of facilitating its interstate and foreign flights from the Chicago airports rendered the temporary storage exemption unavailable to United.*

This extraordinary reasoning would make all the fuel temporarily stored in Illinois by United subject to the use tax because—and only because—it is held for interstate flights departing from Chicago. It causes the use tax to be a direct, unconstitutional burden upon an integral aspect of interstate commerce by virtue of the same decisions of this Court discussed in Part IA of this Brief, pages 21-27, *supra,* as well as a clear discrimination against interstate commerce of the type which has been consistently condemned by this Court. See, e.g., *Halliburton Oil Well Cementing Co.* v. *Reilly,* 373 U.S. 64, 69-70 (1963) and cases cited therein; *Memphis Steam Laundry* v. *Stone,* 342 U.S. 389, 394-395 (1952); *Nippert* v. *City of Richmond,* 327 U.S. 416, 425-426 (1946); *Best & Co.* v. *Maxwell,* 311 U.S. 454, 455-456 (1940). Compare *Evansville-Vanderburgh Airport* v. *Delta*

* As mentioned previously, there are no intrastate flights involved in this litigation.

Airlines, 92 S.Ct. 1349, 1355 (1972) (airport user fees did not discriminate against interstate commerce).

Moreover, the Illinois Court has in effect *conditioned* the availability of the temporary storage exemption to common carriers upon the fuel *not* being stored by them to facilitate the operation of interstate flights departing from Illinois. Ever since *Western Union Telegraph Co.* v. *Kansas,* 216 U.S. 1, 30-37 (1910), holding that Kansas could not impose a capital stock fee computed on the total authorized capital of Western Union as a condition to conducting local business in Kansas, such a condition upon commerce has been clearly unconstitutional. See, *e.g., Quaker City Cab Co.* v. *Pennsylvania,* 277 U.S. 389 (1928) (State cannot impose upon a foreign taxicab company, as a condition of doing business locally, a tax that is invalid under the Equal Protection Clause); *Frost & Frost Trucking Co.* v. *Railroad Commission,* 271 U.S. 583 (1926) (State cannot constitutionally affix to the privilege of using highways the condition that a carrier assume all the burdens and duties of a common carrier); *Terral* v. *Burke Const. Co.,* 257 U.S. 529 (1922) (State law invalid which requires foreign corporation, as a condition of continuing to do business, to refrain from resorting to Federal courts).*

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* The impermissibility of a State's imposing unconstitutional conditions upon the exercise of a legally protected activity, such as the right to engage in interstate commerce, continues to be reiterated by the courts. See, e.g., *Dunn* v. *Blumstein,* 92 S.Ct. 995 (1972); *Garrity* v. *New Jersey,* 385 U.S. 493, 500 (1967); cf. *Watson* v. *Employers Liability Corp.,* 348 U.S. 66, 73 (1954); *id.* at 78-81 (Frankfurter, J., concurring and reviewing authorities); *Patton* v. *North Carolina,* 381 F.2d 636, 640 n. 10 (4 Cir. 1967), *cert. denied,* 390 U.S. 905 (1968). The right to participate in interstate commerce has been accorded the same freedom from direct taxation as other constitutional rights on the theory that the "power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock* v. *Pennsylvania,* 319 U.S. 105, 112 (1943).

C. The Application of the Illinois Use Tax to All the Fuel Loaded Aboard United's Interstate Flights Departing Illinois Results in Multiple State Taxation of That Fuel, and Bears no Relationship to Any Services Provided by the State, in Violation of the Commerce and Due Process Clauses of the Constitution.

This Court has consistently struck down taxes on interstate activities where there is a mere threat of multiple state taxation. Thus, in *Gwin, White & Prince* v. *Henneford*, 305 U.S. 434, 439 (1939), involving the imposition of a Washington state privilege tax measured by gross receipts (as is the Illinois use tax), this Court invalidated the attempt to impose such a tax on the business of marketing fruit which was sold and shipped to various states and foreign countries, stating (*id.*, at 439):

> "Such a [privilege tax measured by gross receipts], at least when not apportioned to the activities carried on within the state [citations omitted], burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject.
>
> "Here, the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, *though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden*

to which local commerce is not exposed." (Citations omitted and emphasis added.)

Numerous other cases decided by this Court have invalidated state privilege or similar taxes which were held to have an unconstitutional impact upon interstate commerce. For example, in *Freeman* v. *Hewit*, 329 U.S. 249 (1946), an Indiana tax upon the gross income derived from interstate sales was invalidated on the ground that it placed a direct burden on interstate commerce. This Court rejected the argument that multiple taxation of the same transactions by other States had not in fact occurred. It was sufficient, said the Court, speaking through Mr. Justice Frankfurter, that the tax directly burdened interstate commerce, *id.*, at 256-257:

> "The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. *Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce."* (Emphasis added).

The Court in *Freeman* relied in particular upon *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307 (1938), in which this Court likewise invalidated the same Indiana privilege tax upon

the receipt of gross income from the interstate sale of road machinery and equipment.*

But this case does not involve potential multistate taxation of the same fuel. Such taxation exists. The purchase of all the fuel in Indiana is subject to the Indiana gross income tax. On an average, the taxable purchase in Indiana occurs 10 days prior to the loading of the fuel aboard aircraft in Illinois. (See Tr. 213-214, App. 129; Tr. 296-297, App. 156-157.) Such multistate taxation has uniformly been held by this Court to be repugnant to the Commerce Clause. *E. g., Central Greyhound Lines* v. *Mealey*, 334 U.S. 653, 662-663 (1948) and cases cited therein; *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-257 (1938); *cf. General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 559-560 (1965).

In addition to the Commerce Clause requirements, as this Court recently noted in the *Evansville-Vanderburgh* case, 92 S.Ct. at 1353 n. 5, a State's jurisdiction to tax is

> ". . . limited by the due process requirement that the 'taxing power exerted by the state [bear] fiscal relation

* In the *Adams* case, this Court stated, 304 U.S. at 311-312: "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that *the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured.* Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, § 8 of the Constitution. [Footnote omitted.] The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but *it is settled that this will not save the tax if it directly burdens interstate commerce.* [Footnote omitted.]" (Emphasis added.)

to protection, opportunities and benefits given by the state.' *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940)."

As previously noted, (pages 5-6, 29-30, *supra*), the Illinois use tax on the fuel involved is not designed to, nor does it bear, any reasonable relationship to services provided by the State to United or other carriers. Not only is the revenue derived from the tax placed in the State Treasury's General Revenue Fund for general state expenses and the public schools, but there are no substantial services provided by the State to the carriers, who are otherwise obligated to pay substantial fees to the City of Chicago that fully support the construction, maintenance and operation of the Chicago airports. Thus the exaction of the use tax on all the fuel is invalid under the Due Process Clause of the Fourteenth Amendment because it bears no "fiscal relation to [the] protection, opportunities and benefits given by the state."

D. The Imposition by Illinois of a Use Tax on All Fuel Loaded Aboard United's Interstate and Foreign Flights Departing From Chicago Constitutes a Toll Upon Interstate Commerce in Contravention of the Fundamental Premises of the Commerce Clause— Where All of the Fuel is Purchased Outside Illinois, Rests in Illinois Only for Such Period as is Necessary for the Support of United's Interstate Operations, and Except for Insignificant Amounts is Actually Consumed Outside Illinois.

Heretofore this Brief has focused on a series of specific constitutional rules which would prohibit Illinois from applying its use tax to all of the fuel loaded by United on its interstate and foreign flights departing Chicago. Underlying these specific issues is the broader question whether, in light of the basic rationale of the Commerce Clause, Illi-

nois should be able to tax all the jet fuel loaded in Chicago by United, even though it is all purchased in another State in a taxable transaction, is stored by United in Illinois only for such period as is necessary to facilitate its interstate and foreign operations from the Chicago airports, and almost all of it is actually consumed outside Illinois.

As was more fully described in the Statement of the Case (pages 16-17, *supra*), Chicago is the hub of United's nationwide operations. Solely because of its geography, Chicago receives a huge volume of air service from United and other carriers not attributable to Chicago's own traffic. Much of this service is through traffic with no local aspect. For it, Chicago is merely a connecting link in a never-ending series of continuous interstate movements that begin and end outside of Illinois. For example, only 5.4% of the United system's passengers originate at Chicago, but 13% of its daily flights depart from there, and 16.5% of its total fuel is loaded there. About 5 out of 8 of United's Chicago passengers are through passengers. The Chicago airports' role in this through traffic is merely to enable passengers to transfer from one flight to another, and to load fuel and supplies aboard the aircraft which remain on the ground no longer than is necessary to perform these functions. Because of Chicago's transit role, United must temporarily store great quantities of aviation fuel each year at Chicago for operational purposes. This fuel comes to rest in Chicago only for such period as is necessary for purification and for the conduct of United's interstate operations.*

Of some 250 million gallons of fuel loaded each year by United on some 85,410 interstate flights departing Chicago, only small amounts of Illinois-laden fuel are consumed in

* See generally pages 10-17, *supra*.

Illinois by about 3.7% of these departures. The remainder of the fuel is actually consumed in and over the other States, a substantial portion after one or more intermediate stops. (See pages 12-16, *supra*.)

The unreality of Illinois' position becomes apparent by reference to the safety fuel reserve requirements of the FAA and United (as approved by the FAA), described on pages 12-14 above, which require air carriers to load large quantities of fuel which are not to be consumed on the particular flight, but must be on board at its destination in another State.* The extensive surveys of United indicates that this reserve ranges, depending on aircraft type, from 35% to 60%** of the fuel loaded in Chicago. (See Stipulation, Appendix 2, App. 43.) For Illinois to impose its use tax on this fuel, which under Federal regulation is to be used on later flights between other States, and which in fact is so used, in reality is a toll on commerce albeit not in classical form.

In effect, therefore, Illinois has sought to gain undue advantage from the geographical happenstance which funnels such a high volume of interstate traffic through the Chicago airports. Its tax bears no relation—and, indeed, is not designed to bear any relation—to the fuel which is actually consumed in Illinois. Yet the theory of a use tax is that it is imposed on the use or consumption of property within the State. Nor does the toll bear any reasonable relation to fair compensation to the State for services rendered. When "the amount of the tax exceed[s] fair compensation to the State," *Capitol Greyhound Lines* v. *Brice*,

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* As indicated on page 13 above, these reserves are in fact on board for essentially all flights.

** The 60% figure is for the Boeing 727, which represents more that half of the departures surveyed. (See Stipulation, Appendix 2, App. 43; UA Ex. 26, App. 238-239, Tr. 118.)

339 U.S. 542, 544 (1950), the tax in question has consistently been invalidated by this Court. 339 U.S. at 554 & n. 3. See generally *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, supra,* 92 S.Ct. at 1354.

It was precisely this sort of exploitation of geography that was deemed to be a major defect in the Articles of Confederation that the Framers of the Federal Constitution sought to extirpate. For example, Alexander Hamilton in the *Federalist* observed the dire consequences for commercial relationships which had resulted in the German states because of the imposition of tolls upon commerce as it passed through each principality:

> "The commerce of the German empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandise passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless."*

Likewise, James Madison noted the extreme dissatisfaction which arose when certain of the States imposed tolls for the passage of commerce through their territory and how this defect was intended to be cured by the new Constitution:

> "The other source of dissatisfaction [with the Articles of Confederation] was the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro' whose ports, their commerce was carried on. New Jersey placed between Phila. & N. York, was likened to a cask tapped at both ends; And N. Carolina, between Virginia & S. Carolina to a patient

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* *The Federalist Papers,* No. 22, at 145 (Mentor ed. 1961). See, in addition, *The Federalist Papers,* No. 7, at 62-63 (Hamilton) (Mentor ed. 1961).

> bleeding at both Arms. The Articles of Confederation provided no remedy for the complaint; which produced a strong protest on the part of N. Jersey; and never ceased to be a source of dissatisfaction & discord, until the new Constitution superseded the old."*

So, also, Mr. Justice Story, in his *Commentaries on the Constitution*, noted the perpetual "irritation and jealousy" which arose because of the tolls which various of the States laid upon merchandise passing through their territory and that therefore one of the principal reasons for affording to Congress the power to regulate commerce among the States was to eliminate the stifling effect upon commerce caused by these state-imposed duties. J. Story, *Commentaries on the Constitution of the United States*, Book II, §§ 259, 260 (4th ed. Cooley 1873).**

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* *The Writings of James Madison*, Vol. 2, p. 395 (Hunt ed. 1901). See, in addition, *The Federalist Papers*, No. 42, at 267-268 (Madison) (Mentor ed. 1961).

** See generally Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 228 (1957):

> ". . . One need not go back to the castles on the Rhine and the Loire, to the hazards and burdens of the overland routes to the Far East, in order to measure the power and ascertain the position of the tolltaker on a strategic trade route. Our own preconstitutional history discloses that the ports and the states astride the trade routes exploited their situation to the disadvantage and displeasure of their less strategically situated neighbors, and that recriminations and reprisals resulted. On more than one occasion, *The Federalist* refers to this unhappy situation and holds out the promise that the proposed Constitution will end it."

See, in addition, Brown, *supra*, at 228-233; Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 Va. L. Rev. 1051, 1053, 1054, 1089 (1960); *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 968-972 (1962).

This Court has frequently and consistently recognized that the elimination of tolls upon interstate commerce was a principal objective of the Commerce Clause, and, indeed, a major factor in the formulation of the Federal Constitution.* Thus, for example, in *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 445-446 (1827), Mr. Chief Justice Marshall stated that the basic rationale of the Commerce Clause was to permit Congress, rather than the States, to exert control over interstate commerce. The Chief Justice continued (*id.*, at 449):

> "If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. *Or what should restrain a State from taxing any article passing through it from one State to another, for the purpose of traffic? or from taxing the transportation of articles passing from the State itself to another State, for commercial purposes?* These cases are all within the sovereign power of taxation, but would obviously derange the measure of Congress to regulate commerce, and affect materially the purpose for which that power was given." (Emphasis added.)

As Mr. Justice Grier noted in *Norris* v. *City of Boston*, 48 U.S. (7 How.) 283, 464 (1849), a State may not refuse a right of passage to persons or property through her territory, or . . . *exact a duty for permission to exercise it.*"

* As Mr. Chief Justice Vinson noted in more recent times, "The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states." *Memphis Steam Laundry* v. *Stone*, 342 U.S. 389, 395 (1952). See also *Hood & Sons* v. *Du Mond*, 336 U.S. 525, 532-534 (1949).

(Emphasis added.) To the same effect, see *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 275-278 (1872).* More recently, in *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422, 434 (1947), this Court stated that "[t]he avoidance of . . . a local toll on passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause." Again, in *Freeman v. Hewit*, 329 U.S. 249, 254 (1946), this Court stated, in invalidating the Indiana gross income tax as applied to certain interstate sales, that "the aim of the Commerce Clause was precisely to

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* In the *Case of the State Freight Tax*, Mr. Justice Strong stated in his opinion for the Court:

> "The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. *The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible.* The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. *Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines.* It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a duty for allowing merchandise to enter or to leave the State upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand." 82 U.S. (15 Wall.) at 276. (Emphasis added.)

prevent States from exacting toll from those engaged in national commerce."*

Yet to establish a toll upon all fuel passing through Illinois to support United's interstate operations, no matter where that fuel was purchased, no matter that its purchase was already taxed, and no matter that almost all of it will be consumed in other States, is precisely what Illinois seeks to accomplish. The situation would hardly be different if the State had actually erected customhouses at the Chicago airports and had demanded payment to the State for the "privilege" of loading fuel so that United and other carriers could engage in interstate commerce. Illinois has in fact created the functional "equivalent to a rampart of customs duties" (*Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 527 (1935) (Cardozo, J.)) on the fuel loaded on United's interstate and foreign flights passing through Chicago. This "unreasonable clog upon the mobility of commerce" (294 U.S. at 527) constitutes a substantial violation of the fundamental rationale of the Commerce Clause, which has been repeatedly enunciated by the Founding Fathers and by this Court. With insight, this Court has held in *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 610 (1951):

> "In this field [of the taxation of interstate commerce] there is not only reason but well established precedent for keeping the federal privilege of carrying on exclusively interstate commerce *free from State taxation*. To do so gives lateral support to one of the cornerstones of our constitutional law—*M'Culloch* v. *Maryland* [17 U.S. (4 Wheat.) 316 (1819)]." (Emphasis added.)

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* See also *Canton R. Co.* v. *Rogan*, 340 U.S. 511, 516-517 (1951) (opinion of Jackson and Frankfurter, JJ., reserving judgment); *Alaska* v. *Arctic Maid*, 366 U.S. 199, 206 (1961) (Harlan, J., dissenting): "I also regard the tax as invalid because it in effect charges a toll for the interstate transportation of Alaska's natural resources. See Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 Yale L.J. 219, 232-233."

II. In the Alternative Illinois Can Tax, at Most, Only That Portion of the Fuel Loaded in Illinois That is Actually Consumed in Illinois.

United has argued in the lower courts, for the reasons stated in Part I of this Brief, that the Illinois use tax, applied to all the fuel which United loads upon its aircraft departing from Chicago, is both an unconstitutional burden upon interstate commerce and denies United due process of law.

United alternatively has suggested, however, that the construction of the Use Tax Act long followed by the Illinois Department of Revenue—namely, that the tax is due on that portion of the fuel which is both stored and burned in Illinois—might satisfy constitutional requirements. Under this burn-off rule the amount of the tax is imposed on the non-exempt temporary storage as *measured* by the amount of the fuel consumed or burned off in Illinois.

As previously mentioned (page 9 *supra*), the *per curiam* opinion of the Illinois Supreme Court rejected this interpretation of the Illinois Use Tax Act, reasoning that the decision of this Court in *Helson and Randolph v. Kentucky*, 279 U.S. 245 (1929), which prohibited any direct tax on interstate commerce, also prohibited any tax levied upon a local activity merely because measured (as might be a property tax) upon property used in interstate commerce. (App. 197-198.) The four-justice majority of the Illinois court also incorrectly applied *Edelman v. Boeing Air Transport*, 289 U.S. 249 (1933), to conclude that Illinois may apply its existing Use Tax Act so as to tax all fuel loaded by United on its interstate flights leaving Chicago. (App. 200-201. See generally pages 8-10, *supra*.) This reasoning produces

the incongruous result that the taxation of *all* the fuel loaded into United's planes at Chicago is deemed *less* of a burden on interstate commerce than taxing only that portion which is actually consumed in Illinois.

The flaw in the lower court's reasoning is that if *Helson* controls the instant situation, it prohibits taxing any of the fuel loaded (see page 26 *supra*); it cannot properly be applied halfway to preclude taxing only that portion stored and consumed in Illinois.

Helson involved a Kentucky gasoline tax which was imposed upon the use of fuel within the State. There the interstate carrier purchased fuel in Illinois, and brought it into Kentucky in the fuel tanks of a river ferry, from which it supplied the propulsive power for the ferry as it traversed the Ohio River. The fuel was neither stored nor withdrawn from storage in Kentucky, so the only possible incidence of the Kentucky tax was upon the consumption of the fuel during the ferry's interstate journey. Such a tax unquestionably constituted a direct, unconstitutional burden upon interstate commerce. Indeed, the fuel sought to be taxed in *Helson* is analogous to the fuel brought *into* Illinois in United's planes, which Illinois has never sought to tax.

The principle established by *Helson* is not applicable to the instant situation. Under the Illinois Use Tax Act, fuel brought into the State for storage or for any other purpose becomes taxable as soon as it comes to rest, because there has been an exercise in Illinois of a right or power over the property incident to its ownership (Ill. Rev. Stat., 1961 to 1971, ch. 120, § 439.2), unless such "use" falls within an exception such as that for temporary storage. If some of the fuel stored in Illinois is actually consumed in the State, the use tax is due on that portion of the fuel, because there has been an exercise of dominion over the property

from the time it came to rest in Illinois, which does not qualify for the statutory exemption—*i.e.*, that fuel has not been used outside the state.* In effect, the tax is imposed on the storage of the fuel prior to the loading, albeit measured by the amount consumed in the State; accordingly, it does not constitute a direct tax on interstate commerce. This is the true rationale of the burn-off rule. It is a distortion to characterize its application as a direct tax on the

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* Both the *per curiam* and concurring opinions imply, although they are definitely not explicit, that if *any* of the fuel stored by United at Chicago is burned over Illinois, the statutory requirements are not met because *all* of the fuel is not solely used outside Illinois. The Court could not have intended, with any regard to due process, to apply this concept to the totality of the fuel stored, because this would mean that if one gallon were burned in Illinois out of the 250,000,000 stored each year, all should be subject to use tax. If the concept were intended to be applied on a plane-by-plane-basis so that if any Illinois-laden fuel were burned in Illinois by a particular flight, all of the fuel loaded on that plane would be taxable because it was not used solely outside Illinois, the application would be directly contrary to the teaching of *McCarroll* v. *Dixie Greyhound Lines*, 309 U.S. 176, 178-179 (1940), discussed at pages 47-48, *infra*. It would also violate fundamental concepts of due process because it appears that a least 64.30% and more probably 96.70% of all of United's departures from Illinois do not burn more than *de minimus* amounts of Illinois-laden fuel in this State. See *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines*, *supra*, at 1353 n. 5; *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940). Moreover, even if it were deemed, contrary to the evidence, that on every flight the Illinois-laden fuel *is completely mixed* with the cold landed fuel, only about 15%, on the average, of Illinois-laden fuel is burned in Illinois by United's flights as they leave the State on the FAA-assigned departure routes. (See Stipulation, Appendix 2, App. 43; UA Exs. 21, 26, 27, App. 234, 238-239, 240, Tr. 100, 118, 120.) In short, regardless of how rigorously the undisputed evidence is construed against United, there is no fair and reasonable basis for Illinois taxing all of the fuel loaded aboard United's aircraft at Chicago.

consumption of fuel in interstate commerce, prohibited by *Helson*.

It is established that if there is a local event on which to impose a state tax, it may constitutionally be measured by that part of interstate activities that occur within the State, provided the measure is reasonable. Authority for this proposition is fully expounded in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines Inc.*, 92 S.Ct. 1349, 1354-1355 (1972). One such measure is fuel consumption within a state by vehicles moving in interstate commerce. See *McCarroll* v. *Dixie Greyhound Lines*, 309 U.S. 176, 178-79 (1940). See also *Thompson* v. *Continental Southern Lines*, 222 Ark. 108, 257 S.W.2d 375, 377 (1953); *Larey* v. *Continental Southern Lines*, 243 Ark. 278, 419 S.W.2d 610, 614 (1967); *Department of Revenue* v. *Greyhound Corp.*, 321 S.W.2d 60, 61 (Ky. 1959); *Lake Shore Coach Lines* v. *Alger*, 327 Mich. 146, 41 N.W.2d 503, 508 (1950); *Mason & Dixon Lines* v. *Commonwealth*, 185 Va. 877, 41 S.E.2d 16 (1947), *cert. denied*, 331 U.S. 807 (1947).*

In the leading case of *McCarroll* v. *Dixie Greyhound Lines*, *supra*, this Court held that highway carriers engaged

* In various other circumstances in which a local aspect of interstate commerce was properly subject to state taxation, the courts have sustained a tax measured by the activities carried on within the taxing jurisdiction. See *e.g.*, *Alaska* v. *Arctic Maid*, 366 U.S. 199, 203-205 (1961) (occupation tax on freezer ships measured by value of fish obtained for processing); *Asiatic Trans-Pacific* v. *Maddox*, 371 F.2d 132, 134-135 (9 Cir. 1967) (where services as agent for van and storage companies were performed in Guam, privilege tax measured by gross receipts from services was permissible); *Higman Towing Co.* v. *Cocreham*, 70 F.Supp. 628, 635 (E.D. La. 1947), *aff'd*, 165 F.2d 789 (5 Cir. 1948) (sustained income tax on petroleum transportation company measured by number of barrels transported and mileage they were transported within taxing State).

in interstate journeys may constitutionally be required to pay a state privilege and excise tax measured by the number of gallons of fuel burned within the taxing state by the carriers' vehicles using the State's highways (309 U.S. at 178-179). Significantly, this case held that the carriers could *not* constitutionally be required to pay a tax upon fuel carried in their vehicles' tanks that would be consumed in other States (309 U.S. at 180). See also *Texas Gas Transmission Corp. v. Benson*, 444 S.W.2d 137 (Tenn. 1969).

The *McCarroll* case both states the application of a basic constitutional principle—that the States unconstitutionally burden interstate commerce when they attempt to tax activities, in this instance fuel consumption, which occur outside of the taxing State—and underscores the vice of applying Illinois use tax to all the fuel loaded, namely, that it is not reasonably related to the activities, that is, the fuel consumption, that actually occurs in Illinois in the course of United's operations from Chicago. In short, state taxation involving interstate commerce can be justified, if at all, *only* to the extent that such taxation is designed to require such commerce to bear a fair share of the cost of the state and local governments whose protection it enjoys. *E.g., Freeman v. Hewit*, 329 U.S. 249, 253 (1946). The rule was precisely stated in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines Inc.*, 92 S.Ct. at 1355, as follows:

> "Thus, while state or local tolls for use of facilities must reflect a 'uniform, fair and practical standard' relating to public expenditures, it is the *amount* of the tax, not its formula, that is of central concern. At least so long as the toll is based on some fair approximation of use or privilege for use, as was that before us in *Capitol Greyhound* [339 U.S. 542 (1950)], and is neither *discriminatory against interstate commerce* nor *excessive in comparison* with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly

the relative use of the state facilities by individual users." (Emphasis supplied.)

This rationale has supported a variety of decisions of this Court holding that States may impose taxes measured by interstate activities so long as they bear some reasonable relationship to state benefits conferred. *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653, 661-664 (1948) (State may constitutionally tax gross receipts apportioned according to mileage travelled within State but not receipts derived from mileage outside of State); compare *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959) (reasonable allocation of income to State for net income tax purposes constitutional) with *Hans Rees' Sons* v. *North Carolina*, 283 U.S. 123, 133-136 (1931) (State income tax apportionment formula unconstitutional); cf. *Norfolk & Western Ry. Co.* v. *Missouri State Tax Comm'n*, 390 U.S. 317 (1968) (property tax formula which included out-of-state property in tax base violated both Commerce and Due Process Clauses). See also *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964) (privilege tax to do business in State measured by gross receipts constitutionally permissible if fairly apportioned).

The taxation by Illinois of all of the fuel stored in Chicago by United for its interstate flights would not be based on any "fair approximation of use or privilege for use," and would be "excessive in comparison with the governmental benefit conferred" as required by *Evansville-Vanderburgh* v. *Delta*, *supra*. Thus, if this Court should conclude, contrary to United's argument in the other parts of this Brief, that Illinois has sufficient contacts with that portion of its fuel used to facilitate interstate commerce that is stored and actually burned in Illinois, or that United's activities in Illinois provide sufficient "local incidents" to sustain the State's privilege use tax, then, under the authorities previously cited in this Part, the exaction of the tax should be con-

stitutionally limited to that portion of the Illinois-laden fuel that is actually consumed by United within or over the State of Illinois.

In construing the Illinois Use Tax Act as not authorizing taxation only of the fuel consumed in Illinois, two of the four member majority below were influenced by their belief that such an interpretation would be unconstitutional (App. 197-198; see page 9, *supra*). If this Court holds both that this was erroneous and that Illinois can tax the fuel consumed within the State, the judgment should be vacated and the case should be remanded to the Illinois Supreme Court for reconsideration of its construction of the Illinois statute in the light of this Court's opinion. A remand is not necessary, of course, if the Court holds that none of the fuel consumed on appellant's interstate flights may validly be taxed.

CONCLUSION

For the foregoing reasons, United requests this Court to reverse the judgment of the Supreme Court of Illinois and to prohibit the imposition of the Illinois use tax on United's fuel which is loaded aboard its aircraft in Chicago for departure in interstate and foreign flights, or as an alternative, to permit taxation only of that portion of the fuel consumed in Illinois.

Respectfully submitted,

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